



THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No.: CJSA/2663/2006

**APPEAL FROM A DECISION OF AN APPEAL
TRIBUNAL ON A QUESTION OF LAW**

DECISION OF THE SOCIAL SECURITY COMMISSIONER

MRS COMMISSIONER E A JUPP

Appellant:	The Secretary of State
Respondent:	Ms Jacqueline Hill
Tribunal:	Fox Court
Tribunal hearing date:	1 December 2005
Tribunal register no.:	U/42/242/2004/09025

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the appeal tribunal (the tribunal) erred in law in its decision given on 1 December 2005 under registration No U/42/242/20064/09025. I allow the claimant's appeal. Under section 14(8)(a)(ii) of the Social Security Act 1998, I set aside the decision of the tribunal, I make the finding of fact set out in paragraph 11 and substitute the decision which I consider it should have made, as follow:

“By virtue of section 3(a) of the Human Rights Act 1998, regulation 15(a) of the Jobseeker's Allowance Regulations 1996 is not to be applied insofar as it is incompatible with the claimant's rights under the European Convention on Human Rights. It would be contrary to section 6 of the Human Rights Act 1998 not to award the claimant contribution based jobseeker's allowance, subject to her fulfilling the other conditions of entitlement. The case is referred back to the Secretary of State to determine whether the claimant satisfies those other requirements”.

2. I held an oral hearing in London on 23 May 2007, the claimant being present and represented by Mr Desmond Rutledge of Counsel. The Secretary of State was represented by Mr P.Raithethe from Office of the Solicitor, the Department for Work and Pensions and by Ms Marie Demetriou of Counsel. I am grateful to them for their assistance.

3. The claimant applied for jobseeker's allowance (JSA) on 30 July 2004. She was then a full-time student, the lone parent of a daughter whose 16th birthday was on 30 June 2004. She was refused an award of JSA under regulation 15(a) of the Jobseeker's Allowance Regulations 1996 (“the 1996 Regulations”) which states:

“ 15. A person shall not be regarded as available for employment in the following circumstances –

- (a) if he is a full-time student during the period of study unless he has a partner who is also a full-time student, if either he or his partner is treated as responsible for a child or a young person, but this exception shall apply only for the period of the summer vacation appropriate to his course and providing he is available for employment in accordance with the provisions of this chapter or unless he is treated as available in accordance with regulation 14(1)(a) or 14(1)(k);”

The claimant appealed.

4. As ultimately refined, the claimant's appeal is essentially on the basis of infringement of her human rights, in that the refusal to award her JSA was a breach of Article 14 of the European Convention on Human Rights, prohibiting discrimination, based on the engagement of Article 1 of Protocol 1 (A1P1), the protection of property, here contribution based JSA.

5. The submission to the tribunal was on the basis that the claimant had claimed only income based JSA. Following two adjournments, further clarification was sought, from which it was plain that the claimant had claimed both contribution based and income based

(JSA) (page 70). The tribunal finally heard the case on 1 December 2005. It allowed the appeal, commenting on the decision notice:

“The issue as to whether single people and couples in full-time education with child caring responsibilities should be treated differently raises a question as to a potential infringement of Article 14 and the consequential discrimination. On this basis I find that [the claimant] presented a reasoned argument and accordingly satisfies the condition so as to allow her claim for income based jobseeker’s allowance.”

The decision made no reference to contribution based JSA.

6. The Secretary of State made a late application for leave to appeal, challenging the adequacy of the tribunal’s reasoning, which the chairman granted. On the basis that the claimant had claimed only income based JSA, the Secretary of State submitted that non-contributory benefits fall outside the ambit of A1P1, and consequently Article 14 could not be engaged, nor was Article 14 engaged by virtue of Article 8, the right to respect for private and family life, as the present case was too remote from that provision. Alternatively, if the case did fall within either A1P1 or Article 8, so that Article 14 was engaged, it was submitted that Regulation 15(a) is objectively justified and therefore lawful. Social Security and tax legislation frequently treats people differently depending on whether they are single or a couple. Solicitors acting for the claimant pointed out that the Secretary of State’s submission was prepared on the basis that the claimant had claimed only income based JSA, and her solicitors emphasised that state benefits under a contributory scheme, such as contribution based JSA fall within the ambit of A1P1. But for the discriminatory effect of regulation 15(a) the claimant had a pecuniary right to JSA for the purposes of A1P1 and Article 14 therefore applied in this case.

7. In the events which have happened, it is sufficient for me to record that after lengthy and detailed submissions, I directed an oral hearing of the appeal. On the morning of the day the appeal was first due to be heard, 15 March 2007, the Secretary of State sought leave to withdraw his appeal. He conceded that for the purposes of this case, he was content to accept that the claimant had claimed contribution based JSA, a benefit which is a possession within the meaning of A1P1. He also accepted that Article 14 could be relied on in conjunction with A1P1 and that the ordinary application of regulation 15(a) of the JSA Regulations had an adverse impact on one sex. Therefore it would not be appropriate to pursue the appeal.

8. He made two alternative submissions for its disposal, if I were not prepared to consent to the withdrawal of his appeal. One need not be discussed further and the other was that I could make a decision that the claimant is not debarred from entitlement to JSA as a result of regulation 15(a), with the other conditions of entitlement to be referred back to the Secretary of State. The claimant’s solicitors objected to this proposal, emphasising that the remedy sought by the claimant is a binding decision on the issue, not a decision applied to her for the purposes of the present case.

9. In view of the plethora of papers submitted at a very late stage, the hearing was postponed. I then refused the Secretary of State’s application for leave to withdraw his appeal and directed there should still be an oral hearing to consider further the nature of any possible discrimination under Article 14, observing that so far the Secretary of State had simply conceded that the ordinary application of regulation 15(a) “has an adverse impact on one sex”. In his latest submission of 15 March 2007, Mr Rutledge, counsel for the claimant, had

moved away from the gender discrimination approach to a contrast of the positions of lone parents with couples with children.

10. At Mr Rutledge's request, the Department for Education and Science provided the following information on 20 March 2007 (page 259):

"Latest complete data from the Student Loans Company, covering English and Welsh domiciled students, are for the academic year 2005/06, and show the following; The number of students in receipt of an amount of [Parental Learning Allowance] is 23,800.

Of these, 19,100 are female, of which 15400 are single (divorced, separated, single or widowed), and 3700 are married or living with a partner.

Males constitute 4700 of the total, of which 800 are single (divorced, separated, single or widowed) and 3900 are married or living with a partner."

11. Further refined, the claimant's submission is based on her personal status as a woman. As set out in paragraph 10 above, a smaller proportion of women come within the exemption in regulation 15(a) compared to men, because there is a higher proportion of full-time students who are female lone parents compared to claimants who are members of a student couple. That is accepted on behalf of the Secretary of State. In the light of the figures set out at paragraph 10, the figure for female lone parents is quite strikingly higher and I accept the claimant's submission and find that to be the case.

12. At the hearing Miss Demetriou stated she had nothing further to add to earlier submissions and accepted the correctness of the submissions on behalf of the claimant. This led us to consideration of the remedy. As submitted by Mr Rutledge, if subordinate legislation is incompatible with the European Convention rights and the incompatibility is not required by primary legislation, then the Court should interpret the subordinate legislation so as to be compatible with Convention rights under section 3(1) of the Human Rights Act 1998 or set aside the subordinate legislation under section 6(1). As Mr Commissioner Howell expressed it in R(IS)6/04, a decision referred to by Mr Rutledge:

"33. By section 6 of the Human Rights Act both the tribunals and I are, as public authorities, forbidden to cause or allow an infringement of Article 6 in the decisions we give except to the extent that we are compelled by or under *primary* legislation: *Wilson v First County Trust Ltd (No 2)* [2002] QB 74, [2001] EWCA Civ 633, para 10. *Secondary* legislation such as these regulations must, to the extent that it is (a) inconsistent with a Convention right (b) incapable of being construed so as to conform with it and (c) not entrenched by a provision of primary legislation, simply yield to the superior force of the primary legislation in the Human Rights Act from 2 October 2000 and, to that extent, be treated as no longer part of the domestic law of this country. That is the clear effect of the overriding primary duties imposed on courts and tribunals as public authorities under sections 3 and 6(1) as regards subordinate legislation outside the special protection in sections 3(2)(c) and 6(2)(b)".

13. As agreed in the oral hearing, under section 3(1) of the Human Rights Act, in so far as it is possible to do so, secondary legislation must be read and given effect in a way which is compatible with the Convention rights. In this case that can be achieved by reading regulation 15(a) so that the references to a claimant's partner are deleted, so that it reads

15. A person shall not be regarded as available for employment in the following circumstances –

(b) if he is a full-time student during the period of study unless he has a partner who is also a full-time student, if either he or his partner is treated as responsible for a child or a young person, but this exception shall apply only for the period of the summer vacation appropriate to his course and providing he is available for employment in accordance with the provisions of this chapter or unless he is treated as available in accordance with regulation 14(1)(a) or 14(1)(k);”

14. The tribunal's decision was clearly wrong in its reference solely to income based JSA, the decision would have had to be set aside on this ground in any event.

15. Hence, I have made the decision which is set out at paragraph 1, as requested by Mr Rutledge. The claimant's appeal succeeds. It is effectively what was offered by the Secretary of State as an alternative method of disposal, although at that stage for the purposes of this appeal alone, in his application to withdraw his appeal, see paragraph 8 above. The claimant has made it plain throughout that she regards this appeal as being a matter of principle. She also asked Mr Rutledge to draw to my attention in the hearing the very serious difficulties which she experienced at the time as a result of the application of regulation 15(a), of which I have no doubt at all. The decision maker at the time had neither the power nor the duty to take the steps which under the legislation the tribunal and I have an obligation to take, and had no alternative but to apply the law as set out in the Regulations, but hopefully the claimant will be comforted to some extent by the final outcome of this appeal.

(Signed)

**E A Jupp
Commissioner**

14 ++June 2007